STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2001-09

February 23, 2001

JEAN MCMANAMY, ET AL
Request for Commission Investigation
Of Portland Water District's Granting of
Easements and Other Development
Rights to Silver Street Development
Of Portland, Maine

ORDER

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. SUMMARY

On January 5, 2001, the Commission received a complaint signed by Jean McManamy and nine other persons against the Portland Water District (PWD) concerning the PWD's granting of easements and other development rights to Silver Street Development (SSD) of Portland, Maine. Based on the information presented to the Commission, we find the complaint is without merit and therefore should be dismissed pursuant to the provisions of 35-A M.R.S.A. § 1302(2).

II. PROCEDURAL AND FACTUAL BACKGROUND

On December 18, 2000, PWD entered into an agreement to grant an easement and other development rights to Silver Street Development for a parcel of land between Walnut and North Streets in Portland. The current transaction is the most recent of a series of transactions between PWD and Union Mutual Insurance Company (UNUM) and its successors,[1] which goes back to the early 1970s. At that time, PWD replaced an open reservoir with an underground reservoir. As a result of this conversion, some of the land on which the open reservoir was located, became excess and unnecessary and in 1972, PWD sold approximately 6.6 acres of land located between Walnut and North Streets. The District retained the land over and in the immediate vicinity of the underground reservoir. Under the terms of the 1972 deed, UNUM was granted the right to cross and recross on foot and with vehicles and otherwise use the reserved property. In exchange for the property rights transferred to UNUM, PWD received $162,000.

The easement granted in 1972 was clarified by an agreement entered into between PWD and the Developers in 1974. Specifically, the 1974 agreement allowed the easement to be used for pavement, sidewalks, open-air parking areas, ways, tennis courts and utilities. This use was subject to a 1974 site plan incorporated into the

[1] Collectively, the purchasers and prospective purchasers of the Walnut and North property will be referred to as "the Developers."

agreement. Apparently, the property was only partially developed as proposed and has changed hands at least one time between 1974 and the present.

In the spring of 2000, SSD indicated to PWD that it was interest in the Walnut and North property and requested that certain modifications to the 1974 easement be made. A series of negotiations followed which ultimately resulted in a December 2000 agreement whereby the PWD accepted the modifications to the 1974 site plan in exchange for 14 conditions of development.

On January 5, 2001, Jean McManamy and nine other persons (Complainants) filed a complaint with the Commission under the provisions of 35-A M.R.S.A. § 1302. The complaint alleges that this agreement provides SSD with land use rights of considerable value and that PWD did not receive any compensation under the proposed transaction. The Complainants also allege that the transfer increases the potential for harm to the public water supply by allowing parking near the PWD underground reservoir and that the PWD has not received Commission approval for the December transaction as required by 35-A M.R.S.A. § 1101.

On January 8, 2001, the Commission issued a Notice of Complaint which informed the District of the complaint filed against it and ordered the District to file its response within ten (10) days of the date of the notice. On January 18, 2001, PWD filed its response to the complaint.

PWD's response states that the District made no material concessions to the Developers under the December 15, 2000 agreement. The District notes that the easement in question was originally granted to the Developers' predecessor back in 1972. The December 2000 modifications to the easement merely change the configuration of the parking lot and in some instances make the parking area 10 feet closer to the reservoir while in other instances the new easement eliminates parking by the reservoir. In addition, the right to put a tennis court over the reservoir was replaced with a gazebo and a playscape.

In exchange for these modifications, the PWD received additional future development rights, the requirement that the developer pay for the installation of a clay lens cap above the reservoir property, additional restrictions on the Developers' use of the property which will further protect the reservoir, and access to North Street through the grant of a permanent easement.

The District also argues that the agreement adequately protects PWD's reservoir through the clay lens cap installation requirement and by:

1. Limiting snow plowing activities in the vicinity of the underground reservoir;

2. Prohibiting routine maintenance and repair of vehicles in the vicinity of the reservoir;

3. Prohibiting the washing of vehicles in the vicinity of the reservoir;

4. Limiting the Developer's use of salt or chemicals on the driveways and parking lots in the vicinity of the reservoir.

5. Limiting the Developer's use of fertilizer and chemicals on the grassed area above the reservoir; and

6. Requiring the Developer's Retention Pond to be located a safe distance from the reservoir and to drain away from the reservoir.

Finally, PWD argues that this transaction does not require approval under 35-A M.R.S.A. § 1101 since the rights being transferred to SSD by way of the December 2000 agreement are neither necessary or useful for the PWD to provide water to its customers. Even if the property were viewed as necessary and useful, the transaction should be considered exempt under section 1101(4) as it does not materially affect the ability of the utility to perform its duties.

On January 25, 2001, at the request of the Commission Staff, the Company filed copies of the deeds related to the 1972 and 1974 transactions. On January 29, 2001, PWD provided the area site plan map which laid out both the 1974 and 2000 plans for development.

On January 25, 2001, the Hearing Examiner issued a Procedural Order which scheduled a case conference for February 1, 2001. In addition, at that time, in order to facilitate the processing of this case, the Examiner requested that the District file a petition for approval under 35-A M.R.S.A. § 1101 by January 30, 2001. The District requested that the requirement that the District file a § 1101 petition be stayed. This request was granted by the Presiding Officer on January 30, 2001, pending the Commission's determination of whether the ten-person complaint should be allowed to proceed under the provisions of section 1302.

III. DECISION

Under the provisions of 35-A M.R.S.A. § 1302(2), if after the filing of the utility's response to a ten-person complaint filed against the utility, the Commission is satisfied that the utility has taken adequate steps to remove the cause of the complaint, or that the complaint is without merit, the complaint may be dismissed. The Law Court, in *Agro v. Public Utilities Commission*, 611 A.2d 566, 569 (Me. 1992) held that:

> The phrase "without merit" must be understood to mean that there is no statutory basis for the complaint, i.e., that the PUC has no authority to grant the relief requested or that the

> rates, tolls, or services are not "in any respect unreasonable, insufficient, or unjustly discriminatory . . . or inadequate.

If the complaint is not dismissed, the Commission must promptly set a date for public hearing. In this instance, based on the information presented, we conclude that the Commission has no authority to grant the relief requested by the Complainants and that the Complainants do not raise any issue that the rates, tolls, or services, of the PWD are in any respect unreasonable, insufficient, unjustly discriminatory or inadequate.

The Complainants allege that the December 18, 2000 transaction between the PWD and SSD requires PUC approval pursuant to the provisions of 35-A M.R.S.A. § 1101. Section 1101 states that a public utility must receive Commission authorization before it may sell, lease, assign, or otherwise encumber, any of its property that is necessary and useful in the performance of its duties to the public. Section 1101(4) states that transactions involving utility property that do not materially affect the ability of a utility to perform its duties to the public are exempted from the approval requirements of section 1101.

As a result of the 1972 and 1974 deeds, the Developer had already been given substantial rights to cross and otherwise use the reservoir property. Under the terms of the December 2000 agreement, the District has granted the Developers the right to use the area over the reservoir for a gazebo and a playscape in the easement area in lieu of tennis courts. In addition, the parking area of the original site was reconfigured. In certain instances, the Developers' parking area will be closer to the reservoir, but, the number of parking spaces in the easement area, has been reduced from approximately 80 to approximately 60. In exchange for these additional easement rights, the District has received considerable protections, most notably the requirement to install the clay lens cap and the restrictions on uses of the parking areas. While a very technical reading of section 1101(1) could be seen to require Commission approval, simply because the District has modified the encumbrance of its property over the reservoir, we find that the change in the easement will not in any *material* way affect the utility's ability to perform its public service function and, therefore, is properly exempted from the approval requirements of section 1101(1) by operation of section 1101(4).

The Complainants also allege that the District did not receive adequate compensation from the Developer. It appears, based on the District's response to the complaint, that the Portland zoning authorities had approved the project and the Developer was ready to proceed without the modifications to the easement. By agreeing to the modifications, the District was able to receive additional concessions. Whether a party maximizes the value it receives as part of real estate transaction can always be subject to second guessing. In this instance, we view the transaction (gazebo instead of tennis courts, reconfiguration of the parking area) to be of such a limited nature that the transaction on its face appears to be reasonable and that any contrary finding would have only a de minimis impact on rates. We therefore conclude

that the allegation of the inadequacy of the consideration is without merit in this instance and should be dismissed.

Finally, the Complainants also allege that the public water supply may be harmed as a result of the transaction. The Complainants could not point to, nor are we aware of any rules concerning water utility practice that would preclude installation of the gazebo and associated improvements over an underground reservoir. We find that the PWD has taken adequate steps to ensure the quality of the water in its underground reservoir. First, we note that there will be no building or parking directly over the reservoir. Second, the entire reservoir tank and the area up gradient from any portion of the surface over the reservoir is to be lined with a clay lens cap. Third, as part of the December agreement, the PWD received specific agreements from the Developer on snow removal, vehicle repair and washing, chemical treatment of driveways and the use of chemicals on grassy areas. We conclude that the District has taken adequate steps to address the issue of water supply protection and therefore this allegation is without merit.

A question which arose out of the filing of this complaint was whether the original transactions in 1972 and 1974, which were not approved by the Commission, required Commission approval. The District argues that once the decision was made to convert the reservoir to an underground reservoir, the property became surplus and was no longer necessary and useful. One could argue, however, that because the reservoir itself was still necessary and useful to the utility and since at least some form of access to the property was still necessary in order to operate the reservoir, a transfer of the property rights which affected such access should have been approved. While this may be an interesting legal question, we believe that the issue need not be decided as part of our decision here. First, we note that the complainants in this case did not actually complain about the original transactions. Second, it appears based on the information presented that the sale price was the result of a legitimate bid process which yielded a fair market value return to the utility and thus, if this matter (with these facts) were placed before us now, we would likely be required to approve it pursuant to *Kittery Elec. Light Co. v. Assessor of Town of Kittery*, 219 A.2d. 728, 737 (Me. 1966). Finally, even if these transactions were properly before us some 28 years after the fact, there appears to be little this Commission could do at this point in time, since property purchased in good faith for value is presumed to not have been necessary and useful, thus requiring our approval, as to the good faith purchaser. *See* 35-A M.R.S.A. § 1102. There is nothing in the record to suggest that either the original purchase or any subsequent purchase was not made in good faith.

Accordingly, it is

O R D E R E D

That the complaint filed by Jean McManamy and nine other persons with the Commission on January 5, 2001, be dismissed.

Dated at Augusta, Maine, this 23rd day of February, 2001.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent
Diamond

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Civil Procedure, Rule 73, et seq.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.